

In the Supreme Court of the  
United States

OCTOBER TERM, 1945

SUNSHINE MINING COMPANY

a corporation

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CHARLES E. RICHMOND

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No.....

SUNSHINE MINING COMPANY,  
a corporation,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

*To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of the United States:*

Sunshine Mining Company prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered on April 3rd, 1940, granting the petition of Respondent for the enforcement of its order against Petitioner.

## OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the Board (R. 214-258) are reported in 7 N.L.R.B. 1252. The opinion of the Circuit Court of Appeals (R. 3191) is reported in 110 F. (2d) 780.

## JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 3, 1940 (R. 3228). A petition for rehearing filed by Petitioner was granted June 7, 1940 (R. 3233). The decree was confirmed without specification of reason June 19, 1940 (R. 3235). The jurisdiction of this Court is invoked under Title 28 U.S.C. § 347, and Sections 10(e) and (f) of the National Labor Relations Act, Title 29 U.S.C. § 160.

## TERMINOLOGY

In this petition and supporting brief the National Labor Relations Board will be referred to as "Board"; the Sunshine Mining Company as "Petitioner", "employer", or "Idaho Mine"; the International Union of Mine, Mill and Smelter Workers as "Union" or "International Union"; Wallace Miners Union No. 14 as "Local 14", Kellogg Mine and Smelter Union No. 18 as "Local 18", and the two locals as "two locals"; the Bunker Hill and Sullivan Mining & Concentrating Company as "Bunker Hill" or "purchaser"; the Big Creek Industrial Union as "Big Creek", and the National Labor Relations Act as "Act."

All italics are supplied unless otherwise noted.

## QUESTIONS PRESENTED

1. Whether the labor relations of Petitioner mining company with its production employees are subject to the Act, when some of the supplies and materials purchased by the company (which supplies and materials form no part of

the ore produced), come from sources outside the state, and when it locally mines, sells and delivers its ore to an independent company which, within the same state mingles the ore with other ores, at a much later time smelts and refines such ores, and finally sells and ships the metals produced from them to its customers outside the state.

2. Whether the Board, when attempting to exercise jurisdiction over an activity which, when separately considered, is local and intrastate, is required to find as a fact, based upon substantial evidence in the record, that a labor disturbance in such local activity would necessarily result in an immediate, direct and substantial diminution of the shipment of goods in interstate commerce or some interruption in the movement of goods or articles across state lines, and if so, whether the Board made such finding.

3. Whether Petitioner is deprived of due process of law by the enforcement of a final order of the Board which found Petitioner guilty of an unfair labor practice in refusing to recognize and bargain with the International Union as the exclusive representative of a unit of its employees called "mine and mill employees" (less certain excluded groups), when the record shows that no claim or demand was made by such Union to represent such unit, and no charge or complaint was filed, issue raised, evidence received or notice given with reference to that Union, or to that unit.

4. Whether there is substantial evidence to support the Board's findings as to the proper unit, majority representation and refusal to bargain.

5. Whether, upon the record, the Board on July 1, 1938, and the Court on April 3, 1940, acted arbitrarily, and abused their discretionary power to order affirmative relief to effectuate the policies of the Act in ordering Petitioner to reinstate all employees who went on strike on August 2, 1937, with back pay from August 18, 1937.

6. Whether the entry of a final order on July 1, 1938, requiring reinstatement of all employees who went on strike, with back pay from August 18, 1937, was an abuse of the Board's discretion because the commencement of the back pay was not postponed until the date of service of the Board's order.

7. Whether employees, who went out on strike solely because their employer refused to recognize a Union as the exclusive bargaining agent for all its employees and to enter into a contract with such Union covering all of its employees, remained employees under the Act, whose reinstatement could be ordered, when the Union in fact did not represent a majority of the employees in such unit, to-wit, of all the employees.

8. Whether Petitioner, who in good faith and upon reasonable grounds doubted the applicability of the Labor Relations Act to it, and raised the question of the Board's jurisdiction at every opportunity, was deprived of due process of law by an order of the Board, ten to twelve months after the act complained of, assessing a penalty in the form of back wages which may amount to over \$300,000.00, where

the Act prohibited Petitioner from obtaining a judicial determination of the applicability of the Act to it, until after the Board had issued its final order.

9. Whether the Board and the Court erred in ordering Petitioner to bargain with the Union when, as the record conclusively shows, at the time of the hearing before the trial examiner an overwhelming majority of Petitioner's employees were not members of nor had designated the Union as their representative, but, on the contrary, had repudiated the Union in writing, had joined another union, and had designated the other union their bargaining agent.

10. Whether the Board and the Court erred in ordering Petitioner to enter into a written contract with the Union.

### STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 29 U.S.C. 151, et seq., and the pertinent provisions of the Rules and Regulations of the Board are set forth in the Appendix, *infra.*, pp. i to viii.

### STATEMENT

#### 1. JURISDICTION

Petitioner is engaged in subsurface mining near Kellogg, Shoshone County, Idaho, (R. 218), employing about 600 men and women. The crude ore produced is crushed and milled, by which process a large part of the non-mineral rock is eliminated (R. 218, 1948, 1946). All ore is sold to the

Bunker Hill (Bd. Ex. 10-P, R. 365, 219, 334-5, 1947, 1925, 1940-1) and is delivered to it at Bradley, Shoshone County, Idaho, (R. 1925-6, 1948, 335, 385-6). Upon receipt the ore is weighed, tested and assayed; the results of the analysis are applied to the contract (Bd. Ex. 10-P, R. 365, 374-6, 1961); and a final settlement sheet is prepared. Petitioner is immediately paid 75% of the purchase price; within 30 days it is paid the balance (R. 1948-52, 1926-30, 219-21).

Immediately after sampling, the ore is taken by the purchaser to its mill at Kellogg and remilled (R. 1952-3, 1959, 1929, 218). Thereafter the remaining concentrates are taken to bins of the purchaser and there mingled with other ore and concentrates (R. 219) either mined by the purchaser itself (R. 3089), or purchased by it from numerous other mines within and without Idaho (R. 387, 1947, 1954). All identity of ore purchased from Petitioner is then lost (R. 1927-8, 1953-4). These concentrates remain piled up in the purchaser's bins for from one to six months or longer (R. 1956, 1958, 1960, 1931). Thereafter the Bunker Hill, by a complicated process including numerous physical and chemical changes, and taking about three weeks (R. 348), produces a comparatively small quantity of metallic end products. In this process at least 80% of the concentrated ore is consumed leaving not more than 20% of the weight of the original ore in the form of a salable product (R. 2928). Finally, the lead and copper products remain in stock for two to three months longer (R. 1943). In other words, 6 months may elapse after purchase and receipt by the smelter before

the ore is manufactured and refined, 3 weeks more before the refining process is completed, and 3 months of storage before the final products are sold and shipped in interstate commerce, or a total of 9  $\frac{2}{3}$  months after the Bunker Hill purchases and receives the raw ore, until it finally ships the end products created by it through the smelting and refining process.

From the moment it receives the ore from Petitioner, all risk of loss and all risk of price change, is on the Bunker Hill (R. 1930, 1933, 1942-5, 1958-60). It owns the ore. Petitioner has no way of knowing how much of the metal which is actually produced from the commingled mass of ores comes from ore purchased from Petitioner, nor what happens to the metal, nor how much it was sold for, nor where it was sold (R. 1930, 1944, 1955, 1957-8). The identity and ownership of all such ore is completely outside its knowledge or interest.

The Bunker Hill's total purchases and receipts of raw material, i.e., ore, in 1937 are shown by Board's Exhibits 12-E, 12-F, 12-G, and 12-H. In May it purchased and received 176 cars (Bd. Ex. 12-E, R. 3049), in June, 204 cars (Bd. Ex. 12-F, R. 399), in July, 199 cars (Bd. Ex. 12-G, R. 400), and in August, 230 cars (Bd. Ex. 12-H, R. 3050). In other words, in August, the month of the strike, it purchased and received 54 cars more than in May, 26 more than in June, and 31 more than in July. Its purchases from Petitioner varied in tonnage from 571 tons in June, 1936, to 1024 tons in October,

1936 (Br. Ex. 10-F, R. 358), and in August, 1937, it purchased and received more ore from Petitioner than it did in any of the first six months of 1936 (Bd. Exs. 10-C, 10-F, R. 356, 358).

The amount of raw material processed, treated and refined by the Bunker Hill varied between 10 to 15 thousand tons a month (R. 1945), the variation undoubtedly depending upon the condition of the market.

In August and September, 1937, the months including and following the strike, Bunker Hill's sales of its products were greater than usually was the case (Bd. Ex. 10-H to 10-O, R. 359-64), and there is no evidence of any effect, direct or indirect, close or distant, minute or substantial, of Petitioner's operations upon the interstate commerce activities of the Bunker Hill or anyone else.

With reference to purchases of materials by Petitioner, the only finding the Board made was that in 1936 Petitioner "purchased supplies, equipment, electrical current, machinery, and other materials used in its operations amounting to approximately \$700,000.00. Approximately 60 per cent of these purchases came from sources outside the State of Idaho" (R. 221). The trial examiner added: "and are generally shipped to respondent F.O.B. Kellogg, Idaho" (R. 134).

The record shows that these purchases were 17 cars of coal, 6 cars of grinding balls, 43 cars of building materials, 19 cars of powder, and 2 cars of machinery (Bd. Ex. 15-B, R. 407-410), most of these materials going into permanent improvements to the mine (R. 2763). The electrical energy

was purchased f.o.b. the power company meter panel at the mine (R. 2762). None of the purchases became any part of the product sold to Bunker Hill (R. 1466), and of course none of them formed any part of the end products made and shipped out of the state by it, and did not go into and could not affect interstate commerce in any way whatsoever (R. 1466). All purchases were used by Petitioner at the mine at Kellogg, Idaho (R. 1465-6) in the operation and equipment of its plant.

## 2. PROCEDURAL DUE PROCESS AND LACK OF SUBSTANTIAL EVIDENCE OF MAJORITY

On June 28, July 9 and August 2, 1937, a committee of nine men visited Petitioner, three representing Kellogg Local, three the Wallace Local, and three the Union (R. 434-5, 442), and presented their demands in the form of a prepared written contract (R. 436, Bd. Ex. 19, R. 448-52), which was a demand by the Union to represent "all of the employees of the Company" (Bd. Ex. 19, R. 450, 437). It was to cover the "wages, hours of labor and other conditions of employment, of all men employed in and about the plants of the Company in the vicinity of Big Creek, Shoshone County, Idaho" (Bd. Ex. 19, R. 448-9). This included all of Petitioner's employees who were eligible for membership in the Union (Bd. Ex. 59, 1179-80), and attempted to put in effect the closed shop and check-off. It was the only demand or request ever made, and was never receded from (R. 496-7).

Petitioner doubted that the Union had a majority of the

employees, and so told the committee (R. 437, 473, 493, 2826, 2813, 2868, 2875). The members of the committee then offered to turn their books over to the Board if the Petitioner would agree to abide by its findings (R. 437, 493). No other offer was ever made.

Petitioner contended that the Act did not apply to it because it was neither in nor affecting interstate commerce (R. 493). It had so told the Board (Resp. Ex. 101-3, R. 2911-15). After the conference on July 9, 1937, when Petitioner again doubted Union's majority of *all* the employees, the Union filed a petition with the Board for certification as the Bargaining agent of *all* of Petitioner's employees (R. 446, 2902). This petition was never acted upon by the Board.

Shortly thereafter a Board representative, Mr. Daniel Baker, who had previously corresponded with Petitioner (Resp. Ex. 98, R. 2909), came to Kellogg to investigate the charge filed in June and the certification petition. (Baker later signed the amended charge (R. 5) and appeared as counsel for the Board in the hearings). After investigation he discussed the matter with Petitioner, informing it of the charge and the petition for certification. He agreed with Petitioner that there was a question of jurisdiction and told it that there was no use doing anything about the charge until the question of jurisdiction was settled (R. 2902-3); that with reference to the petition for certification, two courses were open. Petitioner could either agree to a consent election, or have the matter determined by the Board's regular procedure.

Petitioner elected to have the Board follow its regular procedure (Resp. Ex. 76, R. 2839-40), and a strike followed on August 2, 1937.

After the strike, on August 28, 1937, the Union filed an amended charge alleging:

"That the said Company has continuously refused to recognize and to negotiate with a joint committee of Locals 14 and 18 of the . . . Union . . . as the sole and exclusive bargaining agency for *all its employees*, although said joint committee has been designated by a majority of its employees as the representative of said employees . . ." (R. 4).

On September 3, 1937, the Board issued its first complaint, alleging not that the appropriate unit was *all* the employees, as stated in the charge, but that it was "all the employees" except "*supervisory officials, executives, technicians, office employees*" (R. 10). It further alleged that a majority of the employees in such unit had "designated and selected said *Locals 14 and 18, jointly*, as their representative . . ."; that "Locals 14 and 18 have been constituted and now are jointly the representative . . ."; that "said Locals, acting through a Joint Committee, duly selected by the membership for that purpose, requested the respondent to bargain . . . with said Locals acting jointly as the exclusive representative of all the employees in said unit"; and that Petitioner "refused and does now continue to refuse to bargain collectively with the Joint Committee of said Locals 14 and 18 as the exclusive representative of all the employees in said unit" (R. 11-12).

Petitioner objected to the jurisdiction of the Board and moved to dismiss the complaint (R. 51-4, 26-7), and in its answer admitted that the proper unit was *all* its employees, excluding only supervisory officials and executives (R. 30). This was an admittedly appropriate unit (Sec. 9(c) and 2(c) of Act, R. 237), and all Petitioner's employees in such unit were eligible for Union membership (Bd. Ex. 59, R. 1179-80). Petitioner denied that a majority of all its employees in the unit *defined in the complaint* had designated the Locals as their representative (R. 31), denied that said Locals or any committee thereof had ever requested bargaining rights for the employees in such unit, and alleged that such locals did not represent a majority of the employees in such unit (R. 32).

The principal issues for the hearing were thus determined. They were whether the technical and office employees, as well as the supervisory officials and executives, should be excluded from the bargaining unit of "all the employees"; whether a majority of the unit of "all the employees", less the aforementioned excluded groups, had selected the two local unions jointly as their representative for bargaining purposes; and whether the two local unions jointly had demanded and been refused bargaining rights for such unit.

The evidence on those issues is: The claims of the two locals and the International Union as to membership or designation by Petitioner's employees are shown in Board's Exhibit 51 (R. 1005) and Exhibit 52 (R. 1034); the only ev-

idence as to the total number of employees in the unit in controversy at that time is contained in Board's Exhibit 54 (R. 1043), Exhibit 54A (R. 1158) Exhibit 55 (R. 1063), Exhibit 56 (R. 1082), and Exhibit 57 (R. 1106). Except for Exhibit 54A which lists the supervisory officials and executives, technical and office help, these exhibits show Petitioner's employees without classification as to kind or type of employment.

After the hearings were completed, the Board filed its amended complaint to conform to the proof (R. 2956-8), in which the allegations with reference to unit, representation and refusal to bargain were repeated verbatim (R. 85, 86).

The trial examiner's report shows that the only issues tried were those raised by the complaint as to the proper unit and the number of employees therein, that is, *all* of the employees, less the specified exceptions. The allegations of the complaint were repeated in the report (R. 98-99), which concluded that a unit of all the employees, excluding supervisory officials, executives, technicians, and office employees, was the appropriate unit (R. 124, 130). The examiner then determined the number of men in each local who were employees (R. 125), basing the computation upon the total payroll (R. 126), and found that Petitioner refused to bargain with the *two Locals* as the exclusive bargaining agent of all the employees in the unit in controversy (R. 129). The examiner also found that, at the same time, the *International Union* represented a majority in the same unit (R.

130), and that Petitioner had refused to bargain with it as the exclusive representative of all of the employees, excluding supervisory officials, executives, technicians and office employees (R. 131). The evidence is that the only request the International Union ever made was to represent and be recognized as the exclusive representative of *all* the employees (R. 496-7).

Included in the unit described in the Union's demand and in the *charge* filed against Petitioner, which the Board found was an appropriate unit (R. 237), were mine and mill workers, truck drivers, sawmill workers, assayers, carpenters, blacksmiths, surface workers (*bull gang*), shovel runners, machinists, warehouse workers, electricians, plumbers, watchmen, truck helpers, office workers, painters, engineers, samplers, stenographers, and accountants (Resp. Ex. 62, R. 2106, 855, 924, 1122, 1275, 1317), all of whom were eligible for Union membership (Bd. Ex. 59, R. 1179-80). (Exhibit 62, however, contains the names of only a few of the men who had gone out on strike and only a few of those claimed by the two Locals or the International.)

The unit described in the complaints and the trial examiner's report included all of the above except the office help, the assayers and engineers.

One year after the alleged first refusal to bargain, the Board found as follows:

"We find that respondent's *mine and mill employees*, excluding supervisory, clerical, and technical employ-

ees, constitute a unit appropriate for the purposes of collective bargaining . . . " (R. 228).

The unit shrunk from "all employees" at the time of the refusal to bargain in June, July and August, 1937, and at the time the charge was filed on August 28, 1937, and from "all the employees", except "supervisory officials ,executives, technicians, and office employees," when the complaint was filed to conform with the proof in November, 1937, and when the intermediate report was filed in January, 1938, to only "the *mine and mill* employees, excluding supervisory, clerical and technical employees" in the Board's order. (Incidentally, the exclusion of "supervisory employees" is a much larger exclusion than "supervisory officials and executives.")

This is a unit which no one ever claimed to represent, a unit for which no one ever tried to bargain, a unit with reference to which no one sought to speak. Neither Petitioner nor anyone else ever heard of it until the Board's order on July 1, 1938. The Board found that Petitioner was guilty of an unfair labor practice in refusing to bargain with the Union as the exclusive bargaining agent of this Board-created unit, and that such refusal was the sole and only cause of the strike (R. 237, 244, 232).

The alleged representative of this unit—first it was the International Union, for all employees; then it was a joint committee of the two locals, for all the employees; then it was the two locals, for a few less than all the employees;

then it was all three, the International and the two Locals jointly for a few less than all the employees. Finally, by the Board's order, it was the International Union for only the mine and mill employees (less additional excluded groups).

The Board found that the Union represented a majority of Petitioner's employees in this unit (R. 233).

There is no evidence in the record as to who were the mine and mill employees, the number of Petitioner's "mine and mill" employees, or as to the number of mine and mill employees claimed by the Unions.

There was no finding and no evidence as to what types of employment or classification of employees were included in the phrase "mine and mill employees".

The Board attempted to cure the lack of evidence by deliberately misstating the membership requirements of the Union (R. 221-2). These requirements are shown by the Union's Constitution (Bd. Ex. 59, R. 1179-80), and they clearly make all of Petitioner's employees, except a few officials, eligible to membership in the Union. In order to make it appear, however, that the record showed the number of those of Petitioner's employees joining or designating the Union who were within the unit prescribed by it, the Board found, contrary to the only evidence in the case, that the Union's membership was limited to "mine and mill employees" (R. 221-2). Some of the Board's own witnesses whose names appear on Board's Exhibits 51 and 52, testified they

were members of the union but that they were not mine and mill employees (R. 855, 924, 1122, 1275, 1317).

### 3. BACK PAY AND REEMPLOYMENT

During the strike extreme ill feeling was generated between the strikers and the non-strikers, caused by the campaign of villification conducted by the strikers (R. 847, 2098-9, 2025, 2036, 2058, 2351, 2365, 2430, 2486-8, 2520, 2616, 2623, 2633-4). By reason thereof the non-strikers were violently opposed to the reemployment of the strikers (R. 1978, 2045, 2145, 2150, 2154, 2156, 2161, 2164, 2170, 2179, 2182, 2192, 2193, 2200, 2206-7, 2241, 2266-7, 2273, 2285, 2291, 2295, 2296, 2304-5, 2324, 2353, 2369, 2390, 2423, 2443, 2460, 2470, 2473, 2480, 2483, 2507-8, 2520, 2527-8, 2534, 2538, 2549, 2551, 2561-2, 2592, 2598, 2602, 2637, 2639, 2646, 2652, 2656, 2692, 2698, 2721-2, 2786). Some of the men didn't want them because of the names called; some were afraid to work with them; some wanted revenge; some expected violence. The strike occurred the first week of August, and this testimony at the hearing was given in late September and early October, before a cooling-off period had passed.

When the strike was over, Petitioner realized the feeling of the employees and waited a week before commencing to reemploy the strikers (R. 2884), no new men having been employed since before the strike. This reemployment was earlier than Mr. Graham, the superintendent, thought was advisable (R. 2770), but in spite of the high feelings, the Petitioner wanted to take the strikers back as fast as pos-

sible (R. 2883, 2771, 2922-3). The first men reemployed were run out by the old employees, but Petitioner put them back to work (R. 2771). All parties recognized that the situation was critical and had to be handled carefully. See Union's wires (R. 2937, 2938, 2940, 3104).

Faced with this problem, Petitioner decided on a program of gradual reemployment in order to allow feelings to cool off (R. 2883-4, 2922-3, 2769-72, 838-9, 849). It commenced to reemploy the men slowly, and this system was working well and apparently would have been successful, but the Unions stepped in to block it.

On August 15, 1937, they published and circulated a dodger called "The Sunshine Special", in which all men were notified that a strike condition still continued, and that no man should return to work (Resp. Ex. 91, R. 2890).

On August 17, 1937, they published another circular, informing the men that the mine was still under strike, and that any man going to work would be a "SCAB" (Resp. Ex. 92, R. 2892-4).

On September 3, 1937, the Unions established a picket line at Petitioner's hiring office and on the road leading to the mine to keep the men from returning to work (R. 2063-4, 2465-6, 2468, 2797-8, 2884) and distributed the following circulars to everyone who came there (Resp. Ex. 61, R. 2065, 3095).

### "DON'T BE DUPED!

The Sunshine Mining Company is cleverly planning to offer the LOCKED OUT MARRIED MEN the return of their jobs.

Why? Because they know that if you go back on their terms now—they will not have to pay back wages.

Your case is in the hands of the United States government. You can depend upon definite action very soon. We came off from the job together—We will go back together, when we can be assured that the Sunshine Company will stop its unlawful tactics and discrimination.

WALLACE MINERS UNION NO. 14  
KELLOGG M. & S. UNION NO. 18."

The Union representatives told the men "that they were trying to stop any of the pickets from going to work" (R. 2466).

Even when the complaint was issued (R. 14), and after the hearing when the amended complaint was filed (R. 89), the Unions and the Board claimed that the strike was still on. This was the reason the employment did not occur (R. 2883).

On July 1, 1938, in its final order, the Board ordered the Petitioner to offer immediate and full reinstatement (R. 256) to all employees who went on strike on August 2, 1937, with back pay from August 18, 1937, less wages earned (R. 257), and on request to bargain collectively with the International Union, and to embody any understandings in a "written, signed agreement for a definite term, to be agreed upon", if requested to do so (R. 257). (In 1939 the Board asked the

court to strike the words "for a definite term" from the order (R. 3226), and this was done).

#### 4. MAJORITY REPRESENTATION AT TIME OF HEARING AND ORDER

The Board found that the maximum claims of the Unions were 315 employees, and that the smallest number in the unit was 521. It took 261 for a majority (R. 228-30). The greatest number of employees at any period was 601 (Bd. Ex. 54, R. 1043), though at the time of the hearing Petitioner was employing about 70 or 80 less (R. 2900).

There is no evidence of the Union's membership after July 31, 1937. At the date of the hearing 401 of Petitioner's employees belonged to the Big Creek (R. 3004), and 36 more had appointed it their bargaining representative (R. 3021-2).

In its pleadings the Big Creek claimed to represent a majority of all employees of Petitioner and many more than a majority of the mine and mill employees (R. 56, 72, 77) and prayed that it be recognized and adjudged the exclusive representative of all Petitioner's employees (R. 78).

The only evidence in the record as to the membership in the International and two local unions is Board's Exhibits 51 and 52 (R. 1005-8 and 1934-40), and it is from these exhibits only that the Board could make its findings. Of the persons listed on those exhibits, *sixty-one* employees signed, executed and filed in these proceedings a formal revocation of any and all right of the Unions to represent them. They also worked through the strike, went through the pick-

et lines, joined the Big Creek Union, and appointed it their bargaining agent. Six more revoked the Union's appointment as their representative, designated the Big Creek as such agent, and went through the picket line. One other revoked the Union's appointment and designated and joined the Big Creek instead.

Two more worked during the strike, went through the picket line, and appointed the Big Creek as their representative.

Thirteen more worked during the strike, went through the picket line, and joined and designated the Big Creek as their exclusive representative.

Eight more joined and designated the Big Creek as their exclusive bargaining agent.

Two more worked during the strike and testified they did not want the Union to represent them.

One more testified he did not want the Union to represent him.

Four more worked during the strike, going through the picket lines. (See Appendix 2 for names and record references).

Of the above, 94 definitely terminated all rights of the International Union and the Locals, and the last 4 probably did also. Taking these 94 from the Union's greatest claim—315, leaves only 221, a definite minority of the employees in any unit.

Of the men working before the strike, 289 or 291 joined the Big Creek (Stipulation of parties, R. 2126-7, 2225), names listed (R. 2128-37, Int. Ex. 11, 2226-35), and 12 more had designated it their exclusive agent (Int. Ex. 14, R. 3019-20), a total of 301 or 303.

The Board made no findings with reference to the Union membership at the time of the hearing, nor at the time of its order. It made no findings as to why these 94 men revoked the Union's rights and selected the Big Creek Union. It took the position at the hearing that it was wholly immaterial and irrelevant as to what happened afterwards, if the Union had a majority prior to the strike (R. 2140-2, 1992-3, 2032, 2038, 2056, 2067-8, 2070, 3019-21, 3023, 3032, 3034-6, 3040). The Board did find, however, that the strike caused the Union to alienate a number of its members (R. 232).

As to the number of Petitioner's employees who were mine and mill employees at the time of the hearing, the only evidence is the Big Creek Union's membership and designation list, and it shows that at that time practically all mine and mill employees not only were not members of the Union, and had not designated the Union as their representative, but on the contrary had joined the Big Creek and designated it as their representative. The record shows that at the time of the hearing the Big Creek Union represented a majority of all or any unit of Petitioner's employees.

## REASONS FOR GRANTING THE WRIT

1. The decision of the court below extends the operation of the Act to the labor relations of employees engaged solely in intrastate production of raw materials, even though their employer's product is never shipped in interstate commerce, but is sold to an independent producer or manufacturer who changes it in chemical and physical form, quality, and value, substantially consuming it in the process, and then, after a long and indefinite time, ships the new product in interstate commerce.

Moreover, the decision is apparently authority to sustain jurisdiction of the Board where no more is shown than that a local producer or manufacturer makes purchases of supplies and equipment originating in other states which are used in the productive operation but do not become part of the product. At the very least, the decision would uphold jurisdiction where the employer himself makes the interstate purchases.

Such far-reaching and novel results are of paramount public importance and, if the interstate power can be so drastically extended, it should be done only by decision of this Court.<sup>1</sup>

<sup>1</sup> This Court has recognized that jurisdiction "is left by the statute to be determined as individual cases arise." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 32. Uncertainty is bound to exist where substantially different factual situations are present, and until this Court decides the question of jurisdiction administration of the Act may be impeded.

Apparently the Board is of the same opinion, because, in discussing *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129, in its Fourth Annual Report, Jan. 3, 1940, p. 113 (in which the Ninth Circuit held that the Board had no jurisdiction over the operations of a gold mining corporation which obtained its necessary equipment from dealers inside the state though it was manufactured in part in other states, and which disposed of its product either to local refineries or to United States mints also located within the same state), it said:

"While the Board did not petition for a writ of certiorari in this case, it believes that the jurisdictional issues involved are such as should ultimately be determined by the Supreme Court."

The facts in this case from which jurisdiction must be drawn are clearly distinguishable from the facts in any case yet decided by this Court involving the jurisdiction of the Board. In every case under the Act yet decided by this Court, the product shipped in interstate commerce was produced or manufactured by the person charged with unfair labor practices, and in the same form when shipped as when produced or manufactured.<sup>2</sup>

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<sup>2</sup> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1; *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453; *National Labor Relations Board v. Fainblatt*, 306 U.S. 601; *National Labor Relations Board v. Bradford Dyeing Assn.*, No. 588, Oct. Term 1939, decided May 20, 1940.

In all of these cases the shipment of the product in interstate commerce followed directly and immediately upon completion of manufacture. No other element or process entered into the making of the product after it left the hands of the employer found subject to the Act, and the goods were either immediately absorbed by the ultimate consumer or went into the hands of jobbers or wholesalers for the purpose of resale. In all of these cases it was shown that the flow of the product in interstate commerce decreased on account of the labor dispute, or would certainly and immediately decrease if a labor dispute should develop.

Whatever may be the validity of the position strongly relied upon by the Board in the court below, that interstate purchases of supplies and equipment furnish an independent and self-sufficient ground of jurisdiction of employees engaged in production only, the question can hardly be regarded as settled by the decisions of this Court, since such facts do not appear in any of the decisions under the Act except *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 220, and there the court laid them "on one side" as "mere purchases . . . of supplies." Nor is there any intimation in the language of any of the opinions of this Court that the purchase of supplies and equipment is a determinative factor or that it should even receive consideration when production is being regulated. In all cases where the entry of goods into the state has been considered, the goods were materials which were incorporated into a product finally shipped in interstate commerce. See *National Labor Re-*

*lations Board v. Bradford Dyeing Assn.*, No. 588, Oct. Term 1939, decided May 20, 1940. Petitioner purchases no raw materials nor materials which become part of an interstate shipment.

It seems clear that to sustain jurisdiction because Petitioner's supplies "came from sources outside the state will require the overruling of *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, in which it should be noted Schechter Bros. Poultry Corp. not only purchased chickens in New York from commission men who had just received them from outside the State, but also itself made purchases in Philadelphia and brought them into New York. In that case, as in the instant case, the products purchased by the employer came to a permanent point of rest within the state; were not held, used or sold in relation to any further transactions in interstate commerce; were not delivered to other states; nor was there any "practical continuity" of movement.

In the *Consolidated Edison* case, though the product of the employer was not "shipped" in interstate commerce, a stoppage of work at the employer's plant would have instantaneously suspended the operation of a large number of vital instrumentalities of interstate commerce and brought about a major catastrophe. That a concern like the Edison Company should be held subject to the Act obviously furnishes no guide in this case.<sup>3</sup>

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<sup>3</sup> 37 Mich. L. Rev. 938.

*Chicago Board of Trade v. Olson*, 262 U.S. 1; *Stafford v. Wallace*, 258 U.S. 495, and like cases, involved the introduction of goods into the state and their continuous and immediate transfer out of the state.

Despite the fact that this Court has held that the scope of interstate commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government,"<sup>4</sup> and has said that the word "direct" connotes the absence of an efficient intervening agency or condition,<sup>5</sup> the Ninth Circuit Court entirely disregards the distinction between direct and indirect effects, even going so far as to state that the *Jones & Laughlin* case extended the congressional power "even to the planting in California of orange trees whose product is to be transported in interstate commerce."<sup>6</sup> With such a glaring misconception of the interstate power, it is not surprising that the court below made an incomplete, inadequate, and inaccurate statement of the facts

<sup>4</sup> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37.

<sup>5</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 307, 308.

<sup>6</sup> *National Labor Relations Board v. Sterling Electric Motors*, 112 F. (2d) 63, 67; *Edwards v. United States*, 91 F. (2d) 767, 780, where the court said the interstate power might be extended to "the planting, maintenance or abandonment of citrus groves"; see, also, language in *National Labor Relations Board v. Santa Cruz Fruit Packing Co.*, 91 F. (2d) 790, 792, 793, and *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 144.

which must be considered in determining the relationship of Petitioner's activities to interstate commerce<sup>7</sup> and that the opinion itself did not discuss the break in the chain of causation which we urge upon this Court.

The position of the Ninth Circuit Court upon the range of Federal power, as disclosed by its opinions in the *Edwards*, *Santa Cruz*, and *Carlisle* cases and its application of the Act to the instant case, are plainly contrary to the decisions of this Court, which uniformly adhere to the principle that "Congress may not use this protective authority as a pretext for the exertion of the power to regulate activities and relations within the state which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all of the activities of the people to the subversion

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<sup>7</sup> Omits that Bunker Hill was an entirely independent concern, securing complete title to Petitioner's product, and commingling Petitioner's ore and the ore of many other mines; that approximately 80% by weight of the commingled ore is lost in making the product finally shipped; that long, varying and indefinite periods elapse between intrastate sales of Petitioner's product and shipment of purchaser's different, distinct product in interstate commerce; that the record failed to show the interstate shipments depended upon the ore purchased from Petitioner; that during the serious labor disturbances at Petitioner's mines interstate shipments by the purchaser were greater than was usual; that purchaser has numerous sources of raw material other than Petitioner. The opinion mistakenly calls Petitioner "a silver producer"; implies an agency relation between the purchaser and Petitioner (p. 783); erroneously says that the record shows Petitioner buys all its supplies outside the state and ships them in. (P. 784, but see Finding of Fact I, R. 221).

of the fundamental principle of the Constitution.”<sup>8</sup>

Further uncertainty as to the Board’s jurisdiction is generated by the decision of the court below in this case, in view of the decision of the Ninth Circuit in the *Idaho-Maryland Mines* case, which decision, though possibly limited by the court below in the instant case, has been generally regarded as disapproving jurisdiction of employers whose activities are substantially similar to those of Petitioner.<sup>9</sup>

Future administration of the Act is seriously involved in the question whether the Board’s findings of fact (R. 221, 251) with respect to the effect upon interstate commerce of stoppage of work at Petitioner’s mines are sufficient under the decisions of this Court<sup>10</sup> requiring findings of fact to be formal, explicit and complete.

2. The final order of the Board as enforced by the Court deprived Petitioner of due process of law and so far departed from the accepted and usual course of judicial and administrative procedure as to call for the exercise of this court’s power of supervision, in that it rendered judgment against Petitioner upon issues never raised and with refer-

<sup>8</sup> Chief Justice Hughes’ concurring opinion, *Carter v. Carter Coal Company*, 298 U. S. 238, 317, 318.

<sup>9</sup> 52 *Harvard L. Rev.*, 658; 39 *Columbia L. Rev.*, 834; 37 *Mich. L. Rev.*, 938.

<sup>10</sup> *National Labor Relations Act*, Sec. 10(c); *Wichita Railroad & L. Co. v. Public Utilities Com.*, 260 U.S. 48, 59; *Florida v. United States*, 282 U.S. 194, 215; *Atchison T. & S. F. R. Co. v. United States*, 295 U.S. 193, 202; *West Ohio Gas Co. v. Public Utilities Com.*, 294 U.S. 63.

ence to which Petitioner had no notice nor an opportunity to be heard.

The facts can be reduced to this statement. The Board entered a final order, served on July 1, 1938, which found that Petitioner committed an unfair labor practice in June and July, 1937, in refusing to recognize the International Union as the exclusive representative of Petitioner's "mine and mill employees, excluding supervisory, clerical and technical employees" (R. 227). It further found that that unit was the appropriate unit (R. 228), and that at the time of the requests to bargain, the International Union represented the majority of that unit (R. 233).

The record shows the following facts without contradiction:

1. It was admitted in the pleadings by all parties that the proper unit was "all the employees, less supervisory officials and executives", and the only issue was whether or not the technical and office employees should also be excluded.

2. No union at any time claimed to represent the unit found by the Board, that is, the "mine and mill employees".

3. No union ever requested or demanded bargaining rights for that unit.

4. No charge nor complaint was ever filed, no issue was presented and no evidence was introduced, with reference to that unit. No one ever heard of it until the Board's order on July 1, 1938.

5. Likewise no charge nor complaint was ever filed, no issue was presented and no evidence was introduced, with reference to the International Union as the representative for bargaining purposes of any unit.

6. No notice of the new claims by the Board was ever given and no hearing was held thereon.

The Board's order as to the unit, the demand and refusal to negotiate, the representative, the majority, and the contract, is wholly without support in the record. There is neither evidence, claim, charge, allegation nor complaint upon which those findings can rest.

"To put into the case now an issue heretofore kept out of it . . . would be a denial of a full and fair hearing by the tribunals of the state, a denial forbidden by the Constitution of the nation." (*West Ohio Gas. Co., v. Public Utilities Comm.*, 294 U.S. 63, 77).

The Board and the Ninth Circuit have entirely failed to recognize the procedural requirements of due process. The effect of their decision is that an employer is not entitled to be advised and given an opportunity to meet the charges against it; that it is perfectly proper to charge one unlawful act, file a complaint for another, prove at the hearing that both the charge and the complaint are wrong, and then find the employer guilty of something else entirely different from the charge and from the complaint, and not even raised by the evidence. In his concurring opinion in this case Judge Haney said:

"Third. The Board found that respondent refused to bargain with the representatives of a smaller unit than the one claimed by such representatives. For the reasons expressed in my dissenting opinion in *National Labor Relations Bd. v. National Motor B. Co.*, 9 Cir., 105 F. (2d) 652, 666, I think the Board had no power to find that respondent committed an unfair labor practice by refusing to bargain with representatives of a unit of lesser number than the one claimed by the union. However, I recognize that the cited case is binding on me, and therefore concur with the holding in this case." (R. 3227).

Petitioner has been found guilty of refusing to do an act it was never requested to do, though this court in *National Labor Relations Board v. Columbian Co.*, 306 U.S. 292, 298, held:

"The employer cannot, under the statute, be charged with a refusal of that which is not proffered."

No opportunity was given Petitioner to show that the Union did not in fact represent a majority of the mine and mill employees. That issue was not even brought up, because no one had ever contended that the mine and mill employees were the proper unit; no one had ever claimed that they represented the mine and mill employees; no one had ever sought or asked to bargain for the mine and mill employees. Until the Board's final order no one had even heard of the mine and mill employees as an appropriate unit.

As said in *Burton v. Platter*, 53 F. 901, 905 (C.C.A. 8th):

"Nothing can better illustrate the injustice and irregularity of this proceedings than the statement of these facts. No notice of the ground on which the judgment was to be rendered, no opportunity to contest their execution

of the bond or their liability upon it, was given to any of these interveners until after the hearing was concluded, and the master's report filed."

In administrative proceedings the inexorable requirement is a fair hearing and fair play (*Federal Communications Com. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143), and an employer gets neither unless he is given notice and an opportunity to contest the claim to be made against him.

"It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its actions." (*Wichita R. R. v. Public Utilities Comm.*, 260 U.S. 48, 59).

In enacting Section 10 of the Act providing for a charge, and a complaint based on the charge, and then a hearing upon the complaint Congress "had regard to judicial standards, —not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (*Morgan v. United States*, 304 U.S. 1, 19).

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." (*Morgan case, supra*, p. 18).

Petitioner was never given this opportunity. It was told what the Board's claim was; issue was formed on that claim, and that issue was litigated; then the Board, having wholly failed to establish its claim, instead of so holding and dismissing the proceeding, or referring it back for the formation of new issues and a hearing thereon, simply manufactured

new issues out of whole cloth; and without claim, charge, complaint, or evidence, and without giving Petitioner notice or opportunity to be heard, decided those issues and entered its final order.

"Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." (*Morgan case, supra*, p. 18-19).

Careful observance of fair play by the Board is even more important than by other administrative boards, because no contest of its jurisdiction can be had until after a long and expensive litigation, its findings of fact are given the status of a jury's verdict, and the penalty it assesses against an employer may, as here, amount to hundreds of thousands of dollars. The following statement of this court in *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292, 304-5, applies with special emphasis to the Board's proceedings:

"All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (Court's citations omitted.)

3. There is no evidence, substantial or otherwise, that

Petitioner refused to recognize, negotiate or bargain with any union as the representative of a majority of its mine and mill employees. Nor is there any evidence whatsoever that the Union ever represented a majority of Petitioner's mine and mill employees.

This raises a vital question in the administration of the Labor Relations Act. Under the Act, whenever an employer is presented with a demand to recognize a union as the representative of a majority of his employees within a designated unit, he has two alternative duties: One, a positive duty to bargain with that union if, in fact, it represents a majority of the employees in the designated unit; and, two, a negative duty not to negotiate or bargain with such union if it does not represent a majority of the employees in the designated unit. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44. When the union demanded the right to represent and bargain for *all* of Petitioner's employees, Petitioner, doubting its majority status and right of representation, refused to so bargain. That refusal was a refusal to execute a closed shop contract with the International Union covering and binding all of Petitioner's employees and recognizing the Union as the representative thereof (Bd. Ex. 19, R. 448-52). It was followed by a strike caused solely and only by that refusal (R. 237, 244, 232). Thereafter the Union filed a charge alleging a refusal to recognize a joint committee of two locals as the exclusive representative of all the employees; then the complaint was filed upon the theory that two local unions jointly represented all of the employees,

excluding supervisory officials, executives, technical and office employees. The hearing was had upon the questions whether or not the designated unit was proper, and whether or not the two local unions jointly represented a majority of all such employees.

All parties were agreed as to the method of determining the majority question. Since all of Petitioner's employees were eligible for union membership, it was necessary only to ascertain the names of all the employees, determine those whom the Board claimed were supervisory officials, executives, technical or office help, and deduct them from the number of all of the employees. The remainder would be the number in the unit. It would then be a simple matter to check the Union membership claims with the total lists of employees, and obviously it would make no difference whether the employees were mine and mill employees or saw-mill employees, or surface employees, warehouse employees, truckers, truck helpers, or shovel runners, etc. (R. 125-29, 602, 1004-8, 1033-40, 1043-61, 1063-81, 1081-1100).

This procedure was agreed upon, and apparently followed out (R. 602-3), until the matter reached the Board. It disregarded the earlier proceedings. First it blandly misstated the requirement of Union membership, finding it to be limited to mine and mill employees (though all employees except officials and executives were eligible to membership. (R. 1179-80). Having by this alchemy changed the union members from "all employees" into "mine and mill employ-

ees", the Board then proceeded to find that the Union had a majority of mine and mill employees. It made this finding despite the utter lack of evidence of:

1. Either the number or names of those of Petitioner's employees who were mine and mill employees; and

2. Either the number or names of those of Petitioner's employees claimed by the Union, who were mine and mill employees.

4. By ordering Petitioner to reinstate all strikers with back pay from August 18, 1937, the Board abused the discretion vested in it to order affirmative action to effectuate the policies of the Act. Its order was arbitrary and capricious in the extreme. In so ordering the Board committed, and the Circuit Court sanctioned, such an abuse of power as to call for the exercise of this Court's power of supervision; and decided an important question of federal law contrary to the decisions of this Court. To the extent that the question has not been decided by this Court it should be.

The Board found that the sole and only cause of the strike was Petitioner's refusal to bargain and contract with the Union "as the exclusive representative of its employees in an appropriate bargaining unit" (R. 237).

The Circuit Courts have held that as long as an employer's refusal is based upon a bona fide doubt as to the majority or the unit that he does not act at his peril. *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d)

632, 640 (C.C.A. 4th); *National Labor Relations Board v. Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 556, 558 (C.C.A. 6th); *Black Diamond S. S. Corp. v. National Labor Relations Board*, 94 F. (2d) 875, 879 C.C.A. 2nd). This can only mean, and does mean, that under such circumstances he can refuse to bargain, and if he does so refuse he will not be penalized by a back pay award.

After the filing of the petition by the Union on July 15, 1937, asking to be certified as the exclusive representative of all of Petitioner's employees (R. 446, 2902), and especially after the Board took jurisdiction thereof (R. 2902-3), it would have been definitely improper, if not illegal, for Petitioner to have taken the matter into its own hands and recognized some alleged agency as the exclusive representative of an entirely different unit.

During the period necessary for the Board to make its investigation and to hold its statutory proceedings and issue its order, all parties should be required to maintain the status quo.

Certainly in such circumstances the policies of the Act will not be effectuated by requiring an employer to act, or refrain from acting at his peril.

Petitioner was wholly within its rights in refusing the Union's offer to turn over its books to the Board if Petitioner would agree to be bound thereby (which books would have proven nothing. *National Labor Relations Board v. Empire Furniture Co.*, 107 F. (2d) 92, 94 (C.C.A. 6th) and in prefer-

ring regular proceedings by the Board under Section 9 instead of a consent election. *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. (2d) 167, 175 (C.C.A. 3rd). The Union had petitioned for certification as the exclusive representative of all the employees, and the Board and Petitioner agreed to a regular proceedings under Section 9 of the Act.

The refusal by Petitioner to recognize the Union as the exclusive representative of *all* the employees and to enter into a closed shop contract was correct and lawful (*Jones & Laughlin* case, 301 U.S. 1, 44, Sec. 8(3) of Act) because it was not such a representative. The strike was therefore wrongful and a tort by the Union and the strikers, and the Board was without power to order their reinstatement. *Ballston-Stillwater K. Co. v. National Labor Relations Board*, 98 F. (2d) 758, 764 (C.C.A. 2nd); *Republic Steel Corp. v. National Labor Relations Board*, 107 F. (2d) 472, 478 (C.C.A. 3rd). That this is correct seems to be the result of *National Labor Relations Board v. Mackay Radio & T. Co.*, 304 U.S. 333; *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U.S. 292; *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332; and *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U.S. 240. The distinction between the first case and the later ones lies in the fact that in the later cases the strike involved was a wrongful act by the Union.

During June, July and August, 1937 (and in fact ever since) all parties have recognized that it was questionable

if the Act applied to Petitioner. Likewise all were in doubt as to what was the proper unit, as to whether a majority in the proper unit had selected a bargaining agent, and if so, who.

After the strike Petitioner attempted to employ the strikers. Immediately the Union intervened and by publications and picket lines prevented the men from going back to work. With full knowledge of these facts, however, and undoubtedly as a punishment, the Board on July 1, 1938, ordered reinstatement of all strikers with back pay from August 18, 1937. This may amount to  $10\frac{1}{2}$  months salary for 216 men (if trial examiner's report is correct (R. 140)), or 58,968 working days at an average of over \$6.00 a day—a fine of about \$350,000.00.

This Court has held that the Board cannot punish an employer (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235-6), and that in entering decrees enforcing the Board's order, equitable doctrines control (*Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 373; *United States v. Morgan*, 307 U.S. 183, 191).

Petitioner submits that it is inequitable and unjust to assess this large accumulating penalty against it, and that even if the reinstatement order should not be set aside in toto, the commencement of the back pay should be at least postponed until July 1, 1938, the date of service of the Board's order. The inequity of the order is further shown by the statement of the Second Circuit in *National Labor Relations*

*Board v. National Casket Co.*, 107 F. (2d) 992 ,995, that "when a complaint involves the granting of affirmative relief against an employer it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay, the larger the sum he must pay as wages for work never performed, if the order requires reinstatement with back pay."

It must be remembered that this question would not have occurred if the Board had proceeded to hold a regular certification proceedings, and the Union had not wrongfully struck. At the hearing upon the certification petition all questions of the applicability of the Act, the proper unit and the majority status could and would have been settled by the orderly processes of the law, and no one would have left his job.

5. In enforcing the order of the Board and assessing Petitioner with an enormous accumulating fine and penalty in the form of an award of back wages since August 18, 1937, the decree of the Circuit Court deprived Petitioner of its property without due process of law and decided an important federal question contrary to the applicable decisions of this court.

The rapid expansion of their regulatory powers by federal and state governments raises the question as to whether or not an individual, who acts in the best of faith and upon

the most reasonable of grounds, has a right to have the applicability of a particular law to his activities judicially determined, without facing confiscatory penalties if the Court should ultimately decide that he was mistaken.

Under the Labor Relations Act no judicial determination of the applicability of the Act to Petitioner could be obtained until after the final order was entered. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-9; *Newport News S. & D. Co. v. Schauffler*, 303 U.S. 54; Sec. 10 (a) of Act. An order awarding back pay is a sanction, a fine, a penalty to enforce compliance with the Act (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48; *St. Louis Iron M. S. Ry. v. Williams*, 251 U.S. 63, 66; *Sunshine Anthracite Co. v. Adkins*, No. 804, Oct. Term 1939, decided May 20, 1940), and does not create private rights (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 262).

This Court and the lower federal courts have established the rule that to assess fines, penalties, and liabilities against an individual for acts and conduct prior to a judicial determination that his activities were subject to a regulatory act would deprive him of his property without due process of law, if he cannot obtain a determination of the applicability of the Act until after he is subject to penalties for violating it, and if his doubts as to the applicability, and desire for a judicial determination thereof, are in good faith and based upon reasonable grounds. *St. Louis I. M. S. Ry. v. Williams*, 251 U.S. 63, 64-5; *Wadley So. Ry. v. Georgia*, 235 U.S. 651,

661, 662-3; *Southwestern T. & T. Co. v. Danaher*, 238 U.S. 482, 491; *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338. See, also, recognition of doctrine in *Sunshine Anthracite Co. v. Adkins*, No. 804, Oct. Term, 1939, decided May 20, 1940; and dissenting opinion of Justice Cardozo in *Carter v. Carter Coal Co.*, 298 U.S. 238, 340-1. In the lower courts, also, the doctrine is recognized and enforced. *Uebersee Finanz-Korporation v. Rosen*, 83 F. (2d) 225, 228 (C.C.A. 2nd); *Marysville v. Standard Oil Co.*, 27 F. (2d) 478, 486 (C.C.A. 8th).

That Petitioner acted in good faith and upon reasonable grounds cannot be questioned. That it was mistaken has been found by the Board and the Circuit Court; but its good faith in doubting the applicability of the Labor Relations Act to it, and the reasonableness of its grounds therefor have not been questioned by the Board's order. It continuously maintained its position. In July, 1937, it wrote the Board calling attention to its claim that the Act did not apply to its operations (Resp. Exs. 101-3, R. 2911-5), and the Board's representative and attorney recognized that there was a serious question of jurisdiction (R. 2902-3). After the complaint was filed Petitioner raised the question by motion to dismiss (R. 51), and also in its answer (R. 26), and referred to it in its exceptions to trial examiner's report (R. 142, 193-4). These were noted by the Board (R. 215) and by the Circuit Court (R. 3196-7, 3207).

Certainly no injury can be done to the policy of the Act by enforcing the beneficent policy of the rule here invoked and denying enforcement of the back pay order. As the

Second Circuit said in the *Uebersee* case, *supra*, 83 F. (2d) at 228:

"it is quite incredible that a penalty would or could be enforced against persons who had acted in good faith and done no more than to have their rights adjudicated in a lawsuit."

6. In directing Petitioner to bargain with the Union, though the Union did not represent a majority of either the employees or the mine and mill employees at the time of the hearing, the Board and the Circuit Court ordered Petitioner to violate Sections 9(a), 8(3) and 8(5) of the Act and the policy of the Act as declared in Section 1. In so doing the court decided an important question of federal law contrary to the decision of this court in *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U.S. 240, 262, and also in conflict with that of the Eighth Circuit in *Hamilton-Brown Shoe Co. v. National Labor Relations Board*, 104 F. (2d) 49, 54-6.

Petitioner was ordered to bargain with the International Union as the exclusive representative of its "mine and mill" employees, excluding supervisory, technical and clerical employees, and if an agreement was reached, to enter into a written contract.

The record is not only barren of evidence that the International Union represented a majority of such employees in June, July and August, 1937, but it affirmatively shows without contradiction that at the time of the hearing the Union did not represent a majority of the mine and mill employees,

nor of all the employees, and that a majority of all employees in all classifications of employment had joined and designated the Big Creek Union as their representative for collective bargaining.

This point was raised, but not contested by the Board. Its position at all times was that if the local unions had a majority at any one time, it was wholly immaterial what may have happened thereafter (R. 1992-3, 2032, 2038, 2056, 2067-8, 2070, 2140-2, 3019-21, 3023, 3032, 3034-6, 3040).

Assuming that there is evidence in the record from which the Board could find that some Union or Unions in June, July, and August represented a majority of some unit of Petitioner's employees, the record further shows that at least ninety-four of the employees claimed by the Union revoked any and all right of the Union to represent them. The Board made no finding as to why these men revoked the Union's rights, but admitted that that occurred (R. 3036, 3034, 3019-20). There is also no finding by the Board as to why the men joined and designated the Big Creek Union as their representative, although it is stipulated that they did so, and freely and voluntarily (R. 2126-27). The employees unquestionably had a right to revoke the International Union's agency status, and to join another union.

Under these uncontradicted facts it was error to order Petitioner to bargain with a minority group and thus violate the law. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44. In *National Labor Relations*

*Board v. Fansteel Metal Corp.*, 306 U.S. 240, 262, in which the record showed a change of circumstances, this court said:

"we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining."

The court further held that while it was proper to order the employer to cease and desist from interfering, by dominating a company union, with the employees' right to self-organization that "it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative." (p. 262).

In the *Hamilton-Brown* case, *supra*, (104 F. (2d), 49, 56) the court held that to order an employer to continue to bargain with a Union which had or may have lost its majority status was to order a direct violation of the Act, and further held that to enforce an order to bargain under circumstances similar to the case at bar would be "arbitrary and unfair" and "unwise, if not illegal."

The problem here involved is of major importance in the administration of the Act. It must be determined if the Act is to guarantee the right of free choice to the employees as to whether or not he wants a representative for collective bargaining; if so, who he wants as such representative; and whether he may change the representative at his pleasure.

7. In ordering Petitioner to bargain with the Union, without conditioning such order upon the holding of an elec-

tion to determine whether or not the Union is now the representative of a majority in the established unit, the Circuit Court abused its discretion. Its order is in conflict with decisions of other circuits on the same matter, and raises an important question in the administration of the Labor Relations Act. As the question has not been directly decided by this Court, it should now be determined.

The record in this case tends to show the membership and designation of the Union only as of June 28th, July 9th, and July 31st, 1937. The Union's attempt to organize Petitioner's employees commenced only a short time prior to June 28th (R. 425). The strike occurred August 2, 1937, and the chronology of succeeding events is as follows: The hearing took place between September 5th and October 15th, 1937; the trial examiner's report was served shortly after January 15, 1938; the Board's order was served on July 1st, 1938; jurisdiction of the Circuit Court was invoked on May 15, 1939; the opinion of the Circuit Court was filed on April 3, 1940; and the petition for rehearing was denied June 19, 1940.

Practically three years has passed since any evidence in the record of majority representation. The Circuit Court of the Eighth Circuit in *Hamilton-Brown Shoe Company v. National Labor Relations Board*, 104 F. (2d) 49, 55-6; the Circuit Court of the Second Circuit in *National Labor Relations Board v. Remington Rand*, 94 F. (2d) 862, 869; *National Labor Relations Board v. National Licorice Company*, 104 F.

(2d) 655, 658; affirmed in principle, 309 U.S. 350, 356, 359; *National Labor Relations Board v. American Mfg. Co.*, 106 F. (2d) 61, 68; affirmed in principle, decision per curiam, No. 664, Oct. Term, 1939, decided March 11, 1940; the Circuit Court of the Fourth Circuit in *Standard Lime & Stone Co. v. National Labor Relations Board*, 97 F. (2d) 531, 535; and the Circuit Court of the Seventh Circuit in *Stewart Die Casting Corporation v. National Labor Relations Board*, 113 F. (2d) ——— decided July 3, 1940, have held that the passage of a much shorter period makes it improper to order an employer to bargain exclusively with a union which may previously have been the majority representative until after an election has been held to determine the current choice of the majority of the employees.

The record conclusively shows that a majority of those who were employees of Petitioner at the time of the strike, and a majority of the employees at the date of the hearings either including or excluding the strikers, were at the time of the hearing in fact not then represented by the International Union, but were represented by the Big Creek Union. Ninety-four of those claimed by the Union had revoked its designation in writing. In other words, at the time of the hearing the Union did not represent a majority either of all the employees, or of the mine and mill employees, and at the time of the strike and prior thereto, it did not represent a majority of the mine and mill employees. Neither the Board nor the Circuit Court paid any attention to this fact, and the Board took the position at all times that it was utter-

ly immaterial whether the Union continued to represent a majority after the original request to bargain. The rule of the above cases should be here invoked for the additional reason that in this case no one could ever be certain as to what the proper unit was and what employees were within the appropriate unit.

9. In ordering Petitioner to enter into a written contract with the Union if future negotiations resulted in an agreement, the Circuit Court decided an important federal question which should be passed on by this court. The holding of the lower court is contrary to the decision of *National Labor Relation Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; and the decisions of the Seventh Circuit. It is in conformity with the decisions of other circuits.

Because this Court, on June 3, 1940, granted certiorari upon this question in *Heinz Co. v. National Labor Relations Board*, Docket 73, 1940-41, Petitioner submits this reason upon the showing made in that case and the Court's granting of that petition.

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